

MEMORANDUM

To: Board of Environmental Review

From: Jim Madden
DEQ Legal Counsel

Re: HB 521 Analysis and Takings Checklist

Amendments to ARM 17.30.201 pertaining to water quality permit and authorization fees

Date: January 3, 2002

HB 521 Analysis

Section 75-5-203, MCA codifies, for the water quality statutes, the provisions of house Bill 521 from the 1995 legislative session. Pursuant to HB 521, the Board may not adopt a rule that is more stringent than comparable federal regulations or guidelines that address the same circumstances, unless the Board makes certain written findings establishing the need for the rule. Section 75-5-309, MCA, requires similar written findings before the Board may adopt rules that are more stringent than corresponding draft or final federal regulations, guidelines, or criteria.

No HB 521 findings are required for this rulemaking, because there are no federal regulations, guidelines, or criteria that establish fees for states implementing water pollution control permit programs. Consequently, the proposed fees in ARM 17.30.201 are not more stringent than comparable federal requirements, guidelines, or criteria.

Private Property Assessment Act

HB 311 (1995), codified as § 2-10-101, MCA, requires that, prior to adopting a proposed rule that has taking or damaging implications for private real property, an agency must prepare a taking or damaging impact statement. "Action with taking or damaging implications" means:

[A] proposed state agency administrative rule, policy, or permit condition or denial pertaining to land or water management or to some other environmental

matter that if adopted and enforced would constitute a deprivation of private property in violation of the United States or Montana Constitution.

Section 2-10-103, MCA.

Section 2-10-104, MCA, requires the Montana Attorney General to develop guidelines, including a checklist, to assist agencies in determining whether an agency action has taking or damaging implications. I have completed an Attorney General checklist for the proposed amendment of the water quality permit fee rule (attached). The effect of the rule would be to generate \$479,225 in increased funds for the program in FY2002, for a total FY2002 program funding of \$982,553. The Department estimates that several hundred permittees would be affected, including holders of existing permits and applicants for new permits and authorizations. Pursuant to the guidelines developed by the Attorney General, the proposed amendment of the permit fees does not constitute an "action with taking or damaging implications" in violation of the United States or Montana Constitutions.

Attachment: Attorney General HB 311 Checklist